Quick Find Co. *and* Teamsters Local Union No. 688, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Cases 14–CA–14435 and 14–RC–9292

January 13, 1982

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On August 7, 1981, Administrative Law Judge Bernard Ries issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Quick Find Co., St. Louis, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

DECISION

BERNARD RIES, Administrative Law Judge: These proceedings were consolidated for hearing by an order of the Regional Director for Region 14 issued on January 27, 1981. A hearing on the consolidated matters was held in St. Louis, Missouri, on February 5 and 6, 1981.

At issue is whether Respondent's agents violated Section 8(a)(1) and (3) of the Act by various statements made to employees in October, November, and December 1980, and January 1981, and by refusing to give them a bonus in December 1980; whether Respondent violated Section 8(a)(3) by terminating the employment of five employees on November 6, 1980; whether the ballots cast by four of those employees in an election held on January 9, 1981, should be opened and counted; whether another employee is a statutory supervisor; and whether there is substance to the Employer's objections to the election, which essentially claim that the election was tainted by the union activities of the asserted supervisory employee.

Briefs have been received from all parties.[1] On the basis of the entire record,[2] my recollection of the demeanor of the witnesses, and the briefs, I make the following findings of fact, conclusions of law,[3] and recommendations.

I. ESSENTIAL FACTS

Respondent manufactures storage chests for use on truck beds. It is a small concern, usually employing about eight production employees and one clerical employee. Its facility is located in a warehouse-style buiid-ing which it shares with other businesses.

Dwight Gold started the business 10 years ago, and he remains its president. Until around July or August 1980, Gold had concerned himself with both sales and production functions; sometime in the summer of 1980,[4] Gold named Nathan Fogel, who had begun work for Gold as a salesman in May, to the newly created post of general manager, and Gold thereafter devoted himself more to sales. Other than these two men, there are and have been no managerial personnel.

The production employees signed authorization cards for the Union in October and, on October 22, the Union filed a petition for election with the Regional Office. The complaint alleges that Respondent thereafter engaged in a number of 8(a)(1) violations. On November 6, Respondent laid-off five of its seven full-time production employees, an action alleged to be violative of Section 8(a)(3). The Union filed an unfair labor practice charge on November 13. On December 18, Respondent wrote to the laid off employees, instructing them to return to work on December 26, and all save one did so. After a hearing in the representation case on December 3, an election was held on January 9, 1981. Of the seven ballots cast, five were challenged by Respondent, and the propriety of counting those ballots is an issue here.

[1] After the hearing closed, Respondent moved to reopen the record, attaching to the motion an affidavit alleging certain post-hearing criminal conduct by a witness for General Counsel. Although the motion to reopen was denied, Respondent's brief makes reference to the contents of the affidavit. Terming the allusion "grossly improper," General Counsel has filed a motion to strike Respondent's brief and, as well, to "excise from the file in this proceeding and deliver back to Respondent" the motion to reopen and the affidavit. While I share General Counsel's view of the impropriety of argument predicated on untested allegations, I see no point in engaging in the meaningless and ritualistic action sought by General Counsel. Obviously, I have ignored the affidavit to the extent of my capacity to do so.

[2] Errors in the transcript have been noted and corrected.

[3] The record establishes that it is appropriate for the Board to assert jurisdiction over Respondent, and that the Charging Party is a labor organization within the meaning of the Act.

[4] Unless otherwise specified, all dates hereafter refer to 1980.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Interrogation of Eugene Emily on October 23*

The complaint alleges that, on October 23, Respondent's president, Gold, unlawfully interrogated an employee.

Eugene Emily testified that, on the day Gold received a copy of the election petition, Gold called him into the office and asked if he knew anything about the letter. Emily said that he did. Gold asked if he had signed a card. When Emily gave an affirmative reply, Gold said, "That's all I wanted to know." Gold acknowledged at hearing that the interview had occurred basically as alleged.

Several distinct legal issues in this case relate to Respondent's claim that Eugene Emily is a supervisor within the meaning of the Act. Since Respondent would have been privileged, if Emily was a supervisor, to ask him whether he had signed a card, I shall turn now to the issue of Emily's status.

Emily began working for Respondent at some uncertain time, left employment, and then returned to work for Respondent again in 1976. As of October 1980, he was the most experienced of the seven full-time employees in the shop, the next most senior having been there for perhaps 3 years.

It is clear that, in a real sense, Emily was "in charge of" the production area, which is some 75–100 feet distant from the office and separated therefrom by the premises of another company. Before Fogel was appointed general manager around July 1980, no one, other than Gold, had occupied such a position. Before Fogel, Gold was often away from the plant attempting to market the product, and Emily was plainly the only one available to handle routine supervisory chores.

Gold testified, in fact, that a few years ago he left Emily in charge of the plant for 21 days. Emily testified that there were days, even when Gold was around, that the latter did not enter the production area. At one point, said Gold, he hired a man named Meyer as Emily's "assistant foreman," but Meyer and Emily did not get along, and when Emily "more or less" suggested that Meyer be dismissed, Gold fired him.[5] Fogel testified that, since becoming general manager, he has been away for weeks at a time, leaving Emily "in charge."

Gold testified that, before Fogel, he would screen applicants for employment and send on to Emily those who had passed: "If Emily didn't want them or didn't like them or didn't think he could do it, the employee was just sent away." Fogel testified that, since he had become general manager, 10–15 people have been fired and, on each occasion, after interviewing and selecting a number of attractive prospects, he has had Emily interview them and has then consulted with Emily for his opinion as to their acceptability: "He and I together will select one."[6]

Emily was not asked about his experience prior to Fogel's arrival but, when he was questioned as to occasions on which Fogel has consulted him about hiring, he said that Fogel had brought "a couple of guys out there," one whom he interviewed and the other whom he tested on the punch press as well. Respondent put in evidence four application forms. Two of them, dated June 14 and December 18, 1979, show that the applicants were "interviewed by" Emily (Gold is not mentioned); on a third, dated July 30, 1980, Emily's wife, who serves as the office secretary, wrote, "Looks good to me, Nate [Fogel] & Eugene"; and a fourth, dated August 5, 1980, says, "Eugene said would work out."[7]

It seems apparent that Gold has never comprehensively outlined to Emily the scope of his duties,[8] but his authority seems to have been inherent in the position, as he himself indicated by his actions. Emily conceded that he once warned employee Milton Kernebeck about his drinking but, asked if he had warned anyone else, Emily replied, "No, not for the company." However, employee Hoffman, testifying for General Counsel, said that Emily has "warned a few," and he specified an employee named Chester who was "warned" because he "fooled around with the spray gun." Emily's affidavit also states, "I do try to warn other employees about matters of safety or to keep working, but this is just so nobody gets hurt. "At the instant hearing, he amended this to read that he only tells employees to keep working "if a boss comes around."

Although Emily first testified that he had not recommended the discharge of any employee, he later conceded as truthful the statement in his affidavit that he "did suggest to Fogel that he let one man go," since the man was "on drugs and a danger to the rest of us." Fogel acquiesced in the suggestion, and he testified that he did so without further investigation. Gold further testified that the dismissal of employee Hedrick in 1979 came about because "Eugene suggested that we get rid of him. "Since Hedrick was evidently the "Chester" (see Resp.

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[5] Employee Charles Hoffman effectively corroborated part of this testimony. His affidavit states that he himself "used to be leadman" (although he testified that no one ever *told* him that he was the leadman), but that "Dave Meyer took over" as leadman and was then discharged.

[6] In stating on brief, "Fogel acknowledged that upon occasion, he had rejected applicants for hire who Eugene Emily had recommended be hired." General Counsel mischaracterizes the evidence. Fogel testified that in the course of selecting from a pool of applicants already approved by Emily, their joint selection of one *ex necessitate* constituted "rejection" of others recommended by Emily.

[7] Where Emily's testimony conflicts with that of Gold or Fogel on this supervisory issue, I am not inclined to credit Emily. A reading of the transcript leads me to believe that Emily was of a mind to shape his testimony according to the needs of the case. He testified, for example, that, before Fogel, "no one" was in charge if Gold was absent, a most unlikely state of affairs. While Emily answered negatively a question whether Gold had told him that it was his job "to catch the mistakes of the new employees," his pretrial affidavit states, "Gold has told me that it is my job to catch the mistakes of new people. "Again, Emily testified in the representation case hearing, "Well, I approved them to go home early. When they tell me they have to go home, why, I say, well, sure . . . . Then I go out and tell the supervising manager that he had to go home early." In his pretrial affidavit, he contrarily said, "If the bosses aren't present I can't let the men off, if the bosses are there, the men must see the bosses." But then at the hearing, he further contradicted his representation case testimony by answering "No" to the question whether the men "come to [him]" when they want to take off and no higher authority is present. Although Emily was a personally impressive witness, this sort of testimony seriously weakens his reliability.

[8] I note, however, as earlier brought out, the statement in Emily's affidavit that Gold told him it was his job "to catch the mistakes of the new employees." Emily said this happened in 1976.

Exh. 12) who was, according to Hoffman, warned by Emily for his behavior with the spray gun, Gold's testimony seems probable.

The record shows that Emily is primarily in charge of training new employees and gives them the required orientation. Gold further said that, before Fogel, the decision about whether to retain a probationary employee depended entirely on Emily's evaluation of him, and Fogel testified that he asks Emily periodically how new employees are working out and whether they should be kept on. Emily conceded that "sometimes" Fogel asks him how a new employee is getting along.

Emily spends most of his day at physical labor, primarily in operating a punch press. When he arrives in the morning, he evaluates the situation in order to determine the kind of parts which need to be manufactured, and they are accordingly fabricated. When a special unit needs to be built Fogel will tell Emily, and the latter will instruct the other employees.[9] If a part is needed, Emily will "sometimes" send an employee to the office to get it, and it is also Emily's responsibility to notify Fogel that supplies are needed. He further conceded that if he finds that "something is done incorrectly," he will bring it to the attention of the offending employee. While Emily testified that he moves employees from one job to another only if "they run out of work," Kernebeck testified that Emily "does have the power to move people around" to help make parts which are in short supply, and Kernebeck has seen him do so. Emily testified that when an employee runs out of work, "in order to keep them working, you know, I'll switch them to something else."

There are other indicia of supervisory rank. Emily earns $5.62 an hour; the other employees earn from $4 to $4.43. For the period of a year in which the timeclock was broken, Emily certified the hours worked by the employees on their timecards. According to Gold's uncontradicted testimony, Emily undertook, without instruction, to "cross-train" employees in functions other than the ones they were performing. His sense of management-oriented responsibility seems to be demonstrated by the fact that he once volunteered to work overtime for a week because they were "real low on stock."

It does seem reasonable to argue that the hiring of Fogel introduced an extra layer of supervision into the plant which would naturally have tended to diminish Emily's own position. But it appears from the record that, when Fogel took over, Gold spent less time at the business,[10] thus leaving Fogel to assume some of Gold's duties, and correspondingly less of Emily's than might be expected. Fogel testified that, on a normal day, he spends 30–45 minutes in the shop (apparently in a series of visits), and sometimes as much as an hour. That is not an inconsequential total period of time per day, and it might be contended that Fogel's daily presence suggests that Emily's supervisory authority is negligible.[11] Nonetheless, it appears to me that in many respects Fogel, continuing to be active in sales after becoming the general manager, relied upon Emily to oversee a production operation with which Fogel had no prior experience, and that, as shown above, Emily in fact regularly exercised recognized supervisory functions.[12]

The foregoing analysis leads me to believe that Emily is a "supervisor" within the meaning of Section 2(11) of the Act. While not a high-ranking manager, Emily does appear to have the authority, "in the interest of the employer," to "transfer," to "assign," and "responsibly to direct" employees, and to "effectively . . . recommend such action[s]" as "hire" and "discharge." An employee who, *inter alia*, plays a vital part in the hiring process, who takes it upon himself to recommend that employees be discharged, who warns employees about their behavior, and who tells employees to stop doing one job and start upon another, possesses the authority contemplated by the statutory definition.

I further find that Gold did not violate the Act when he asked Emily about the letter on October 23. General Counsel argues, in the alternative, that even if Emily is a statutory supervisor, Gold's questioning would have tended to coerce Emily's wife, a statutory employee who was present at the time. The short answer is that if Gold was acting legitimately in interrogating Eugene Emily, that action could not have radiated an unlawful fallout on Susan Emily who, the law presumes, recognized the propriety of the questions put to her husband.[13] I therefore recommend dismissal of this allegation.

B. *The Alleged November 7 Violation*

Employee Milton (Bud) Kernebeck figures in most of the 8(a)(1) allegations.

Kernebeck worked for Respondent from 1974 to 1976, when he was discharged. He returned to work around February 1980, left in May, and then came back around August.

Kernebeck and Eugene Emily were the only full-time production employees not laid off on November 6.[14] On the morning of November 7, Kernebeck, Eugene Emily, and Susan Emily were in the production area when General Manager Fogel came in. The three employees gave generally congruent testimony as to the nature of the conversation which followed. In Kernebeck's words, Eugene asked Fogel why the employees had been laid off. Fogel said that Respondent's inventory was overstocked. Kernebeck asked if it had anything to do with the Union. Fogel asked what the main complaints of the employees were. Kernebeck named several items. Fogel

[9] Normally, however, it appears that the work is routine, and that employees require no particular instruction.

[10] Gold said that he is sometimes there no more than "10 minutes a week," and never "all day."

[11] I take note here of Fogel's testimony that he tries to be in the production area at the beginning of each workday, and that he once asked a group of employees, at 7:30 a.m., and in Emily's presence, why they were not working (thereafter, however, he asked Emily, "Why aren't your men working?").

[12] Since I conclude that the November layoff was motivated by unlawful considerations, it does not surprise me that Fogel did not consult with Emily, a known union supporter, about that decision.

[13] Gold testified, without contradiction, that not long before the hearing, Susan Emily had remarked to him that she "always thought [Eugene] was the foreman until [she] talked to the National Labor Relations Board lawyer."

[14] I put aside here Gold's brother, a Social Security pensioner who worked half-days.

commented, "I wish I'd have known something about this. Maybe I could have done something about it." Kernebeck replied, "Well, no matter what you can do, you're not going to stop the Union." More was said, which Kernebeck could not recall, and Fogel left, saying, "Well, let me see what I can do."

Fogel remembered the conversation generally, but recalled no reference to the Union. He did, however, remember being told of the employee complaints and saying that he was "new as a manager there," that he had implemented a hospitalization program for the employees, and that he "would try and do things that would be better for the employees." He did "not recall" asking what grievances the employees had.

The complaint alleges that Fogel "solicited grievances from employees and impliedly promised to remedy those grievances in order to discourage employees' union organizational activities and/or union sympathies."

Although, as earlier noted, the testimony of the Emilys on this point is generally supportive of Kernebeck, there is one difference. The Emilys had Fogel saying only that he "wished we would have come to him first instead of going to the Union" (Eugene) or that "he wished that he had known, he could have done something about it" (Susan). This has a wistful, beyond-repair, connotation, arguably inconsistent with an implied promise to rectify wrongs. But Kernebeck testified that Fogel said, "Well, let me see what I can do," and Fogel himself recalled saying that he "would try and do things that would be better for the employees." Given this concession, and given my conclusion that, as the three employees testified, Fogel did solicit them to express their grievances,[15] I conclude that Fogel did indicate to the employees that Respondent would improve their employment conditions if they would withdraw their support of the Union, in violation of Section 8(a)(1).

C. *The Alleged November 12 Violations*

The complaint perceives four separate violations of the Act in a single conversation between Kernebeck and President Gold on November 12; it alleges that Gold unlawfully "interrogated" Kernebeck, informed him that employees "would not better their employment conditions," "threatened employees with loss of benefits," and "threatened to discharge employees."

Kernebeck said that, on November 12, Gold came into the plant area and called him away from working with Eugene Emily. Gold asked, "What's going on around here?" After some coy parrying, Gold said, "You know what I'm talking about, this Union. Did you join it?" When Kernebeck said he had, Gold then asked why he had not told him; Kernebeck spoke of a fear that Gold would have fired the lot of them. Gold then asked if Kernebeck planned to "stick with this," and the latter said that the employees were trying to better themselves. Gold told him, "Well, you're not going to better yourself, I guarantee it."

After further argument about whether certain employees were being treated fairly, Gold again asked if Kernebeck was going to "stick with this." Kernebeck indicated that likelihood. Gold then said, "You know, you were booked for a raise," and also said, "There was two guys that were definitely going to get fired, and you know who they are." After finally asking whether Kernebeck was "going to stick with this," Gold left.

Asked about an approach made by him to Kernebeck on November 12, Gold recalled a conversation in which Kernebeck had argued with him about the entitlement of certain employees to a vacation. He said that "[w]hen it came to the union business, he asked me about the thing and the question did arise as a result of one of his questions, are you going to stick with that?" Gold then said that Kernebeck "brought the union up," and that he did not "ask [Kernebeck] how he felt about the Union." Gold further agreed that there had been a conversation in which Kernebeck "was talking about the Union and I said two of those guys should have been fired."

Kernebeck is a convicted felon, and his convictions—for armed robbery and for concealing that prior conviction on a Federal form relating to the purchase of a shotgun—are relevant to his trustworthiness. Despite his checkered background, he was a most spontaneous and convincing witness. Gold, on the other hand, became less and less persuasive as his testimony went on. In this particular instance, for example, I find it very difficult to reconcile his admission that he asked Kernebeck whether he was "going to stick with" the Union with his denial that he asked Kernebeck "how he felt about the Union."

Eugene Emily, standing 20 feet away, testified that he overheard some of the conversation. As noted, Gold confirmed that he had a conversation or conversations in which he asked Kernebeck if he was going to "stick with" the Union and said that "two of those guys should have been fired." The record shows that Gold returned to this country from a long absence only the day before November 12, and it seems likely that he might have chosen that day to sound out Kernebeck. I conclude that the discussion between Gold and Kernebeck occurred as the latter says it did.

The persistent questioning about Kernebeck's union activities and intentions is, under Board law, violative. Gold's "guarantee" that Kernebeck would not "better himself" by resorting to the Union does, as General Counsel argues, unlawfully connote that such resort is a futile act. The comment that the employees "were booked for a raise" implies, without more, that benefits would be withheld because of the union activity.[16]

[15] Fogel made a pleasant personal appearance, but he only could "not recall" asking the employees what their complaints were, and in other respects his testimony seemed suspect. The three employees did not, I believe, fabricate this, and the course of the conversation would logically flow as the employees described it and as Fogel partially corroborated it.

[16] That Gold actually made such a statement is supported by his testimony at the hearing that "to be very frank with you, all of them were booked for a raise at that particular time, that's right, and then this occurred." On brief, General Counsel requests that, although the matter was not alleged, Respondent be found to have unlawfully withheld a previously scheduled wage increase. In my view, the question was not sufficiently litigated. Among other things, I have no idea what Gold meant by "booked," the size of the purported increase, or when such an increase would have become effective. Indeed, in view of Respondent's failure, due to business conditions, to pay employees their customary bonuses in 1980, as discussed hereafter, I very much doubt that a wage increase was more than a distant cloud on Gold's mental horizons, despite his testimonial assertion. In my view, Gold was simply attempting to put pressure on Kernebeck by this remark.

I disagree, however, with General Counsel's final contention that Gold's reference to "two guys that were definitely going to get fired" constitutes a "threat to discharge employees due to organizing activities." While the allusion did occur in a conversation linked to the union effort, this statement was not given a specific context by Kernebeck, and it does not fit easily into the conversation described by him. The remark very likely related to the November 6 layoff and to a claim by Gold that, even if there had been no layoff, two of the employees were destined for departure in any event. Since there is no showing that those two (whoever they might be) to whom Gold was referring played any prominent role in the organizing activity—indeed, the record shows that Emily and Kernebeck, the two employees *not* released on November 6, were the only employees at all instrumental in bringing in the Union—there is no basis for finding a threat to discharge employees because of their union affiliation.

D. *The Alleged November 13 Violation*

The complaint alleges that Gold unlawfully told an employee "that Respondent had delayed employees' efforts to be represented by Charging Party by causing the proceeding in Case 14–RC–9292 . . . to be blocked from processing."

A hearing on the petition was to be held on November 13. Gold appeared at the Regional Office as scheduled, but because the Union filed an unfair labor practice charge on November 13, based on the November 6 layoff, the hearing was not held.

Kernebeck testified that later on November 13, when he went to Gold's office to tell him something, Gold, with Fogel present, made reference to the fact that he had been at the Regional Office and said, "Well, we've got you blocked for a couple of weeks." Gold's testimony on this point is less than pellucid; he seemed to be saying that he did have a conversation with Kernebeck on November 13, but that is not at all clear. He denied, however, ever telling Kernebeck that the Union had been "blocked."

I do not believe that Kernebeck fabricated the essence of this unusual remark. On the other hand, it seems possible that Kernebeck misunderstood the import of what Gold was saying. Under routine procedure, the effect of the Union filing a charge was to "block" the processing of its own representation petition; it then apparently filed a waiver which allowed the election to proceed. Gold, a layman representing himself at the time, was probably told about that procedure by the Board agent assigned to the case. In turn, Gold probably told Kernebeck, also presumably a stranger to Board procedures, that the case had been "blocked," an arcane usage whose meaning likely escaped Kernebeck. There is no reason to think that Gold would have said that "we've got you blocked" when the blocking effect arose from the Union's own charge, a fact easily ascertainable by Kernebeck.

Moreover, even if Gold made the remark as testified by Kernebeck, I would doubt that it violated the Act. General Counsel regards it as analogous to cases where employers have expressed their "intent to delay Union representation through endless appeals," citing *Two Guys Discount Department Stores, Inc., a wholly owned subsidiary of Vornado, Inc.*, 242 NLRB 1139, 1149 (1979). No such broad-gauged intention is indicated by the statement assertedly made by Gold.

E. *The Alleged November 14 Violation*

On or about November 14, Gold had a brief conversation with Susan Emily, his secretary. The complaint has parsed this conversation and analyzed it as containing three separate violations of the law, asserting that Gold "interrogated" Emily, "solicited grievances" from her, and "impliedly threatened to discharge employees."

Emily testified that Gold told her, on what she "believe[d]" was the day that he had had a meeting with the Labor Board, that "they had come out second."[17] He asked her if "we were going to go through with this," and she said she had nothing to do with it. Gold then inquired whether her husband intended to "go through with it." She said that he would and that, even if he wanted to back off, he would not do so, "because as soon as the Union would turn away, you would fire him." Gold then said, "Well, what can they do now." Emily replied, "Well, by what a Union guy has told him, they can't be fired for wanting a union in there." Perhaps at some point in this conversation, although Emily was not sure about that,[18] Gold said that he "couldn't see why the guys couldn't come and talk to him first. And, you know, see if they couldn't come up with something."

While Gold denied asking Emily if she was "going through with this" or how her husband "felt about it," he did seem to concede having had a conversation with her at least generally along the lines described by Emily.[19] Susan Emily was a most credible witness, and I believe her testimony.

The interrogation of Emily as to the future plans of the employees was a violation; I think; even though the question was inapplicable to Susan, who was excluded from the petitioned-for unit, it did inquire into the sentiments of the other employees ("if we were going to go through with this"). I think the Board would hold this to be coercive.

Abstractly, Gold's question, "Well, what can they do now," may be ambiguous, but I think the context reveals it to be threatening. Emily spoke of Eugene's concern that he would be subject to discharge by Gold if he abandoned the Union. Gold's response, "Well, what can they do now," intimates that he was telling her that "they" had no protection from discharge even with the shield of the Union, and Susan's reply to the remark suggests that she, too, thought that he was saying that he was free to fire the employees: "Well, by what a Union guy has told him, they can't be fired for wanting a union in there." I think Gold's statement amounts to a distinct,

[17] This suggests that the conversation occurred on November 13, not November 14 as alleged. Emily did not clarify who Gold intended to characterize as the "they" who had finished second.

[18] That might have been in the same conversation.

[19] To the question whether he asked her if Eugene and the others were going through with the effort and whether she had replied that Eugene would not back down for fear of being fired without union support, Gold replied, "I think that she mentioned that, I think that she strung up a conversation and did say that."

if implicit, threat that, as General Counsel puts it on brief, he "could fire the employees for their activities if he so chose." See *General Iron Corp.*, 218 NLRB 770, 776 (1975).

As set out, Gold also said that he "couldn't see why the guys couldn't come and talk to him first. And, you know, see if they couldn't come up with something."[20] I believe this was, as alleged, a solicitation of employee grievances, and that it did imply that those grievances would be remedied if the Union was abandoned. While the solicitation was not addressed to the direct concerns of the employee who heard it—a nonmember of the proposed bargaining unit—it does appear to be intended for transmission to those to whom it would be meaningful. I doubt that Gold was simply engaging in idle or uncalculating chatter. I suppose, rather, that his deliberate intention was to send a message to Susan's husband and the other employees that he would lend a willing ear to employee complaints if only, to use other words uttered by Gold, they would not "go through with this."

Accordingly, I find the three violations alleged in the complaint.

F. *The Alleged December 22 Violations*

The complaint alleges that Gold unlawfully interrogated an employee on December 22. Kernebeck testified that, on that date, Gold and Fogel came to his work location. Gold said, "You're back here all by yourself. We thought we'd come back and aggravate you for a while."

Gold then asked, "What's going on?" Kernebeck said he had heard nothing "since you guys went down to the Labor Board." Gold said that he thought Kernebeck did "know something" and that "You and Eugene both know what's going on." After referring to the forthcoming election, Gold asked, "Well, how are you going to go?" Kernebeck replied that he had already told them how he was "going to go." Somewhere along the line, Gold asked, "Who started this thing with the union?" Kernebeck told him that Eugene was the original instigator, but that he himself reactivated the effort after a hiatus.

Fogel recalled Kernebeck telling them that Eugene had originated the campaign, but said that that discussion took place in Fogel's office. Questioned at the hearing about an occasion on which Kernebeck was asked about the latest "scuttlebutt," Fogel had a "vague recollection" of a time when Gold made the comment "what's happening" to Kernebeck, after which "Mr. Kernebeck said, nothing, and we kept on walking." It would be surprising that a brief encounter could have been so memorable, unless it was less succinct than Fogel suggests. Gold, however, did "think" that he had a "conversation out in the plant with Kernebeck about the 22nd." In his recollection, however, Kernebeck "came to me and started talking Union." Nonetheless, he conceded that he asked, "Who started this thing,' and asked how Kernebeck "was going to vote with regard to the Union."

I credit Kernebeck's detailed account, as partially corroborated by Gold, that the two managers approached and questioned him, and I find that Respondent thereby engaged in impermissible interrogation, in violation of Section 8(a)(1).

The complaint alleges that,on December 22, Gold "advised an employee that this employee would not receive a bonus or a raise due to the union organizing"; and that, since that date, "Respondent has failed and refused to grant its employees a regularly scheduled Christmas bonus because the employees engaged in union and/or concerted protected activities."

Kernebeck said that, after the conversation with Gold and Fogel on December 22 set out above, Fogel later came into the shop again, at which time Kernebeck asked for his Christmas bonus. Fogel said his hands were tied, but that he thought it was "going to be delayed." He said he would ask Gold to speak to Kernebeck the next morning, however.

Gold followed up the next day, coming into the production area and telling Kernebeck that no bonuses would be given because "we haven't made enough money this year." Kernebeck argued that he thought he was "entitled to my bonus," and Gold replied, "Well, we do too. We want to give you a raise, but we can't because the NLRB will be on my ass." After a long discussion, Gold relented and then and there wrote Kernebeck a check for $50. When Kernebeck thanked him, Gold said, "You're welcome. I still don't know how you're going to go."

The testimony shows that, for the preceding several years, Gold had given his employees a bonus each July and December. The amount of the bonus was evidently discretionary with Gold. The evidence also shows that Gold had not paid the bonus in July of 1980, due, he said, to business conditions. In view of that circumstance, there is no reason to believe that he would have given all the employees a bonus in December, Union or no Union. Accordingly, I recommend dismissal of the allegation that the Christmas bonus was withheld due to union activities.

General Counsel's lengthy brief does not alternatively argue that the $50 payment to Kernebeck was an unlawful grant of benefit. It would seem to fall into that category. By giving Kernebeck $50 and saying, "I still don't know how you're going to go," Gold related the payment, which he at first had said he would not make, to Kernebeck's vote in the upcoming election.[21] The grant of such a benefit, in these circumstances, is a good example of the "fist inside the velvet glove" effect held by the Supreme Court in *N.L.R.B.* v. *Exchange Parts Company*, 375 U.S. 405, 409 (1964), to be the theoretical underpinning of the prohibition against awarding certain benefits. I believe that the issue was sufficiently litigated to permit a finding of violation here.

The complaint asserts that Kernebeck was unlawfully "advised . . . that . . . [he] would not receive a bonus or a raise due to the union organizing." As for the bonus, Kernebeck testified, as noted, that Gold ascribed his (ini-

[20] I have noted above that Susan Emily seemed unsure whether these particular comments were also made on November 13. Since they clearly did occur within the 10(b) period, the precise date is immaterial. Gold was not asked whether he had made such remarks to Susan.

[21] Gold conceded that he gave Kernebeck the money, and explained that he did so because Kernebeck "badgered" him.

tial) failure to pay a bonus to the fact that Respondent had not "made enough money this year." He did go on to say, however, "We want to give you a raise, but we can't because the NLRB will be on my ass."

I find no violation here. In the first place, there was, in point of fact, no demonstrated actual withholding. In view of Respondent's failure to pay bonuses in July and December, I do not believe that it had any real intention of giving a wage increase in the latter month, and I am certain that Kernebeck so appraised the situation.[22] Gold was simply engaging in puffing when he said that "[w]e want to give you a raise." Moreover, the explanation that no such raise could be given "because the NLRB will be on my ass" was, in the circumstances, a wholly realistic judgment of that portion of the corporate anatomy on which the Region might land if Respondent were to suddenly award a nonscheduled benefit just prior to an election. Gold did not attribute the failure to grant a raise to the fact that the employees were interested in the Union as such, nor did he imply that the outcome of the election would make a difference as to whether the employees would or would not receive an increase.

General Counsel cites the violation found in *Pacific Southwest Airlines*, 201 NLRB 647 (1973), where the employer summoned the employees to his office and "informed them that the promised wage increases would be canceled in view of the Union's demand for recognition, pointing out that the law did not permit the Company to provide higher wages or benefits which could persuade employees not to support the Union." In that case, however, the employees had been told only 5 days before (and prior to receipt of the union demand) that they would be receiving the increase. It is clear that the employer could have properly proceeded with the increase under controlling law, and that the Board reasonably inferred that the cancellation would be understood by the employees as "an act of retaliation for their continued adherence to the Union." *Id.* at 648.

The Board also said, in dicta, that in cases in which no violation has been found arising from a withholding of increased benefits, the mechanics and resolution of which have not been finally formulated . . . full explanation of the reasons for the withholding along with the assurance of future consideration of the withheld benefits, notwithstanding the outcome of the union's election campaign, serve to dissipate any assumption that the employees may or may not have that the union's presence is the sole obstacle to the ultimate realization of the promised benefits." *Ibid.* The Board did *not* say that such "full explanation" is a prerequisite to legality, and, in fact, in the case cited by the Board in its discussion, *The Great Atlantic & Pacific Tea Company, Inc.*, 192 NLRB 645 (1971), where no violation was found, the Board had specifically noted that "Respondent made no announcement to the employees that its policy had changed and that the employees would receive the raise regardless of how they voted in the election."

Here, Gold spoke to a single employee about a possible raise which, I am confident, that employee had no reason to believe had been under serious consideration. Gold did not lay at the Union's doorstep the blame for withholding the tenuous raise, but attributed the problem to a legal prohibition. I consider the remark considerably less offensive than those found by the Administrative Law Judges to be proper in *C. P. & W. Printing Ink Company, Inc.*, 238 NLRB 1483, 1512 (1978) (speech to employees; the normal wage increases would not be given "because under the National Labor Relations laws it would be illegal for me to do so at this time while the Union election is pending. If I were to do so the Union would claim that I was trying to bribe you . . . . All I can tell you is that once the election is over one way or the other then something can be done") and *Richard Tischler, et al., d/b/a Devon Gables Nursing Home et al.*, 237 NLRB 775, 787 (1978) (employees were told that "pay raises were at a standstill [because] of the Union's representation petition and that if the Union succeeded in representing the employees, their wages would be a matter for collective-bargaining negotiations"). These remarks might be said to contain "assurance of future consideration of withheld benefits"; to my mind, they can be construed as more ominous than assuring, and perhaps a good demonstration of why such "assurances" are better omitted altogether.

Accordingly, I recommend dismissal of this allegation.[23]

G. *The November 6 Layoff*

The complaint charges that when, "on or about November 6, 1980, Respondent laid off and/or terminated employees Michael Rangel, Joseph Emily, Charles Hoffman, Robert Moore and Donald Dilschneider," it violated Section 8(a)(3) of the Act. I find substance in the allegation.

The election petition, as earlier noted, was filed on October 22. On November 6, General Manager Fogel told Susan Emily that all the production employees, with the exception of Eugene Emily and Milton Kernebeck, were to be laid off that day.[24] After November 6, the latter two employees were put to work fabricating safety guards for the machinery, a measure evidently thought to be prudent as a result of an earlier OSHA investigation. Eugene Emily, however, also continued to perform production work, finishing up some incomplete units, during the first week after the layoff.[25]

A hearing in the representation case was held on December 3; the Regional Director's Decision and Direction of Election issued on December 12, setting an election for January 9. The complaint in this case issued on December 4.

[22] Gold testified that 1980 sales were down 24 percent from 1979.

[23] I have, nonetheless, found violative Gold's November 12 statement to Kernebeck, "You know, you were booked for a raise." The situations differ. In November, Kernebeck had not been informed that Respondent could not even afford to pay a bonus. Moreover, the open-ended November 12 statement strongly implies that future benefits would be withheld simply because of, and for no other reason than, the union activity.

[24] Gold's brother, a part-time worker, was also retained, according to the payrolls in evidence.

[25] G.C. Exh. 4, however, also shows that a substantial number of units were produced on November 25 and 26, and December 5, 9, 12, and 22, prior to the recall of the employees; this was apparently done by Kernebeck.

On December 18, the laid-off employees were recalled to work, effective December 26.

Respondent contends that the layoff was simply necessitated by an excessive stockpile of inventory. Gold, who left for Europe on Sunday, October 26, and did not return to this country until November 11, testified that before he left, and even before he received the petition, he told Fogel, "If you can't sell the merchandise and there is no place to put it, they are not working, just lay them off." Fogel testified that he thereafter decided to lay off the employees on November 6 because the space available for storing completed units was "totally used up" and the inventory was spilling into the aisles, and he thought it necessary to cease production until the inventory had been reduced by sales.

In his testimony, however, Fogel did not mention that Gold had given him any instructions in the matter before he left on his trip. Fogel's testimony, in fact, sounded as if he had received no instructions. Asked if he made the layoff decision himself, Fogel answered:

> THE WITNESS: There was a—no—well, I guess, yes, I did because there was no one available for me to talk to and I am referring to Mr. Gold. He was on a trip, on an extended trip and he wasn't available and so because of no space available I couldn't see where we would go if we were still manufacturing, so I laid them off.
>
> JUDGE RIES: Can you recall how many days prior to November 6 you first made that decision?
>
> THE WITNESS: It was on my mind for at least a week; for at least a week I did not consult with Susan or anything. It is just when I reached that point I just laid them off.
>
> JUDGE RIES: I see, and you did not consult with Mr. Gold about that?
>
> THE WITNESS: No, he was unreachable. To be specific he was out of the country.

There was plenty of opportunity here for Fogel to refer to Gold's prior instructions, but it appears that he deliberately chose not to do so, perhaps to insulate Gold from any role in the decision.

Of considerable importance to Respondent's case, and for different reasons, to General Counsel's, is the fact that once before in 1980 Respondent had also laid off its employees. In May, because of an inventory buildup, Respondent began reducing the hours of its production employees and, for a 5-week period, each employee worked from 1 to 4 days a week; not a week went by during this time in which each employee did not work at least 1 day.[26]

Employee Charles Hoffman, who counts the inventory of finished units each day, testified that, at the time of the May layoff, there were "[a]bout 150" units in stock.[27] While Gold, asked if he has ever had 150 pieces in inventory, answered, "I don't know of any," he also professed so scant a knowledge and recall of the circumstances surrounding the May layoff (e.g., as to the part he played in it, he "may have offered the suggestion to [Eugene Emily] or said something" about the need for laying the employees off) that there is no reason to discredit Hoffman.[28]

General Counsel's Exhibit 4 is a stipulated summary of Respondent's daily inventory and daily shipments (permitting, by deduction, calculation of each day's production) from July 7 through December 31.[29] It shows that, as of the morning of November 6, the inventory consisted of 125 units. It further shows that there had been a steady increase in the size of the inventory since July. In that month, the number of units on hand ranged in the 40's and 50's; in August, in the 60's and 70's; in September, it reached the 80's and 90's; in October, it started at 94 and hovered in the 120's; and for the days of November 3–6, the inventory showed, respectively, 118, 122, 125, and 125.

But the stock had been at 125 before November. It hit that figure on October 17 and again on Ocotber 20, went to 126 on October 22, was at 128 on October 24 (the day after Respondent's receipt of the election petition, and Gold's last day at the office before leaving for Europe), and had reached 130 on the morning of October 30.

Thus, when Fogel says that the storage space was "totally used up" and the inventory was spilling over into the aisles with 125 units on November 6, that intolerable state of affairs, and worse, had also been true on the mornings of October 17 (125), 20 (125), 22 (126), 24 (128), 27 (127), 29 (127), and 30 (130). And it is hard to imagine where Respondent had stowed the 150 units, representing 17 percent more inventory than on November 6, on hand when the May layoff, which was only a partial one, was instituted.

Although Fogel is inconsistent on the point, it seems to be implicit in his testimony that he delayed the layoff in the hope that a rash of sales would reduce the inventory; that is a not insensible position. But there was no particular reason, so far as the record shows, for Respondent to have expected a sudden and immediate sales surge as of October 17, when the unacceptable 125 figure was first reached, and no employee was laid off, any more than it might have anticipated one in early November. The evidence indicates that this is an unpredictable, day-to-day, business: orders apparently come in suddenly and without advance notice, and Respondent attempts to fill them immediately from stock, unless a special, customized order is received. If it were true that 125 units left Respondent "totally out of space" on November 6, that same problem certainly existed on October 17, and

[26] During this period, Eugene Emily was the only employee who continued to work full time.

[27] Unfortunately, Respondent's retained inventory records begin only with the July 1980 figures.

[28] I recognize, of course, that Hoffman stands to benefit from an unfair labor practice finding.

[29] Although Fogel at first testified that the "Total Daily Inventory" shown represents inventory at the end of the workday, he subsequently said that it depicts the inventory at the beginning of the day; the figures on the exhibit make clear that the latter statement is the accurate one.

The exhibit is plainly inaccurate in certain respects, and incomplete in others. For example, Respondent should show a greater daily inventory on December 3 than the 70 units indicated, since it began December 2 with 73 units and shipped out only 2 on that day. The numbers given for November 12 and 13 do not distinguish between the figures for each of those days; and there are no figures shown for certain days in the final 2 weeks of November.

no persuasive reason presents itself for not having laid off employees on the earlier date, or even more urgently on any of the successive days on which the inventory reached or exceeded that figure; either there was enough space or there was not.[30]

In answer to the hypothetical question whether he would have laid the workers off if he had more room for inventory, Fogel replied, "It wouldn't have crossed my mind to lay them off at this time if there was room for storage." But since the record shows that Respondent had managed to accommodate 130 units on October 30 and 150 units in May, it seems reasonable to believe that it could not have been pushed to the hilt by 125 units on November 6.

Other evidence tends to create serious suspicion about Respondent's motive. Susan Emily testified that, soon after the layoff, Gold came to her and told her to cancel the shipment of two units for which she had already made shipping arrangements; he had never previously taken such an action.[31] She also said that Gold was holding on his desk orders for some two dozen units, also an unusual occurrence. While Gold denied that he had done so,[32] I believe Emily.[33] The fact that two extraordinary shipments of 16 and 19 units were made on November 25 and 26 (such a pattern—35 units shipped in 2 days—is not replicated during the period shown, although in July 34 units were sent in a 2-day period) indicates that units were, as Emily said, held back. It seems reasonable to suppose that Gold, who had only returned to the country on November 11, had some half-formed idea about padding the size of the inventory for a while,[34] but finally allowed his better judgment to get the best of him.

Susan Emily also testified that when, on November 6, Fogel told her that the men were to be laid off, he said, "Frankly, I was told to lay them off last week." Fogel testified that he believed he made a remark that he "should have had the layoff a week earlier." Susan Emily seemed quite believable but, since the two versions, while similar in structure, have quite different meanings, I am not inclined to rely upon what may have been a mistaken impression on Emily's part as to the intention behind Fogel's comment.

The most suspicious circumstance is the fact that, in contrast to May, when the employees had been permitted to work part time, until the inventory had been reduced, in November the layoff was total (except, of course, for the retention of Kernebeck and Eugene Emily). Fogel testified that he had been aware that the earlier layoff had been partial, and he said that he had "thought about . . . and discarded" the notion of using a similar system in November. His reasoning is opaque:

> Because it seemed to me that production would really suffer from that. You know, if we are going to have any kind of production and health and system there [sic], let the same two people, especially with the need for the safety guards and a welder, that to hire someone who cannot weld, I cannot have him making safety guards.

This seems to be an attempt to say that the need for the installation of safety guards had become so pressing that, to Fogel's mind, only those employees whose skills could contribute to the manufacture of such equipment could be retained until the job was done. Why there could not be both safety guard fabrication and regular production is not clear to me. Indeed, the record shows that, during the week following November 6, one of the retained employees continued to put the parts drawers together while the other made safety guards.

There was obviously no urgency about the installation of the guards. Fogel testified that he had anticipated installing them for "[a]t least a month to a month and a half" as a result of an OSHA investigation into an injury. On the other hand, his earlier noted testimony that "[i]t wouldn't have crossed my mind to lay them off at this time if there was room for storage" clearly shows that installation of the guards had no high priority.

But beyond this, if the only reason for not retaining all the employees on a part-time basis was, as Fogel seemed to be saying at this juncture, because he wanted to accomplish the safety work, it would seem that once that work was completed, he might then have been in a position to do what he had "thought about . . . and discarded." But although the guards had been finished at least by December 10, as indicated by Fogel's testimony, the men were not recalled until December 26.

The inventory exhibit shows that the stockpile dropped substantially after November 6. By December 5, it had fallen to 62 units, the lowest inventory Respondent had had on hand since August 11. The laid-off employees, however, were not recalled to work until December 26, 3 weeks later. As indicated, Fogel explained this by saying that December was anticipated to be a "slow month." This explanation, of course, directly conflicts with his other testimony that the layoff was solely due to lack of space, and that he would not have thought of laying off the employees "if there was room for storage." Surely, by the beginning of December, when the inventory dropped into the 70's, there was no question that there was sufficient "room for storage." And one would expect that in an inflationary economy, it makes some

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[30] Fogel, a newcomer to the trade, also testified that he anticipated no sales increase in December, traditionally a "slow" month. While that history may be true, and the following may be fortuitous, the figures for 1980 in this record show almost an exact parity of units shipped for September-October and November-December (respectively, 72-64, and 72-63). Gold could not "recall" ever having had a layoff in November or December prior to 1980.

[31] Emily was confused at the hearing about the time of this incident. Her pretrial affidavit, given on November 19, states that it occurred "about last Wednesday or Thursday or Friday, November 12-14."

[32] Gold's denial was less than surefooted. Asked if two dozen orders were held up, he replied, "I heard that yesterday too and not to my knowledge." That rather uncertain posture was strengthened when the question was asked again: "No way because I want to see them going out the door."

[33] The record shows that one unit was shipped out on November "12 & 13," but the exhibit does not show on which of those days it was shipped. The exhibit also shows a shipment on Friday, November 14; it reflects no figures at all relating to Monday, November 17, but it may arguably be deduced from the inventory figures for November 14 and 18 that no shipments were made on the November 17; two units were shipped on November 18, none on November 19, and one on November 20. Susan Emily testified that a customer inquiry during this period led Gold partially to rescind his order.

[34] The representation proceeding was scheduled for November 13.

sense to produce now rather than later; if the inventory were to start to accumulate again, the employees could always be laid off again.

Despite the new availability of storage space, the recall of the employees was long delayed.[35] The contrast between May and November is, thus, striking. In May, when the inventory had crept up to 150 units, Respondent had nonetheless been sufficiently considerate of its employees to permit all of them to continue working part time, obviously for the purposes of benefiting them personally and maintaining the crew intact. In November, after the advent of the Union, not only was the bulk of the work force totally severed from the payroll, but also no effort was made to retrieve them until long after the time at which, according to one branch of Fogel's thought process, it would have been appropriate to recall them—when there was "room for storage."

The evidence shows that Respondent has for years posted on a shop wall a set of plant rules. One of them reads, "Any employee off three days or more, unless on paid vacation is automatically removed from employees list. If they are allowed to return they return as a new employee." In composing the eligibility list for the January 9 election, Respondent omitted the five employees who had been laid off on November 6, claiming, as it still does, that the rule operated to render the five ineligible to vote, since they had been "automatically removed from employees list" as of the election eligibility date (which was "the payroll period ending immediately preceding the date of" the Regional Director's December 12 Decision and Direction of Election). On brief, General Counsel theorizes that "the true motivation for the timing of the layoff" was Respondent's intention to attempt to take advantage of this rule.

The argument appears to be substantial, although I am less than sure that Gold was trying to manipulate the initial layoff in accordance with any Board procedures known to him. The record indicates that at least as of December 11, when he filed an answer to the present complaint, Gold was still unrepresented by counsel; I doubt that he was cognizant of the eligibility date concept, as such, on November 6.

Nonetheless, it probably did seem likely to him around that period that employees who had not been working for him for some time might not be allowed to vote when and if an election was ultimately held, and that it would possibly work to his advantage to attempt to sever their connection with Respondent in the hope that Respondent's 3-day rule would be honored by the Board in the future. To the extent that it makes sense to draw a retroactive inference from later behavior, Respondent's subsequent insistence in the rcpreeentation case, and here, that the employees lost their status by operation of the rule seems specious. As explained by Gold, the rule was evidently adopted in order to allow him to have a printed scapegoat to which he could point when an employee went on an unannounced absence and then returned several days later to find that a replacement had been hired; apparently, Gold felt more at ease having something in writing on which he could blame the employee's loss of a job. This situation, obviously, is a far cry from the case of an employee who has been involuntarily laid off and is awaiting recall to work.[36]

I have taken into account Kernebeck's testimonial confirmation of his statement in a pretrial affidavit that: "Work was getting slow. We were pretty much stocked up at Quick Find. Employees were sort of expecting a layoff." On later examination, he said that since they were getting close to the 150 units which had been in stock in May, he thought that Respondent would use that situation to combat the union effort by a total layoff.[37] It is understandable that the employees might foresee the possibility of a layoff in the near future, should the stock reach the 150-unit mark. There was also every reason for them, and for us, to suppose, however, that, in more ordinary circumstances, there would be no layoff at all until the same conditions existed—accumulation of 150 units—which had obtained in May, and that any layoff then required would only be partial.[38]

From the foregoing, I conclude that Respondent was acting in response to the union effort when it laid off five employees on November 6.[39] While it could be argued that the vice lay only in the failure to invoke a partial layoff rather than a total one, and that the remedy should be limited accordingly, I think that the evidence supports a more comprehensive finding. Given that Respondent allowed the stock to reach 150 units in May before concluding that it had run out of storage space, it must be inferred that space was still available at the 125-unit mark on November 6, and that the layoff was simply not warranted on that basis on that date.[40] Given, again, Fogel's testimony that he would not have considered a layoff on November 6 had there been room for

[35] Fogel testified elsewhere that the reason for eventually calling back the employees on December 26 was that "inventory had been reduced through my efforts of selling and it was time to go back into production." If reduction of inventory was the criterion, the record shows that on December 18, when Respondent wrote to the employees, the inventory stood at 64 units, a level higher than the 62 in stock at the end of the day on December 5.

[36] One might seriously question whether this rule was meant to be more than symbolic. Another rule reads, "Any employee not reporting for work by eight o'clock in morning has voluntarily quit." It seems doubtful that, on every occasion on which an employee failed to arrive by the appointed time, Respondent marked him down in the records as "quit" and "rehired." Furthermore, the two rules seem to be inconsistent. If an employee has "quit" by failing to report at 8 a.m., what would be the purpose or effect of waiting for 3 days of absence to "remove [him] from employees list"?

[37] Employee Charles Hoffman testified that he also "was looking for a layoff, but not that soon."

[38] While the record is silent on the question of whether Respondent could have anticipated its immediate future shipments as of November 6, I note that in the 3 workdays following that date, it shipped 20 items, reducing its stockpile to 110 units as of the end of the day on November 11. This latter figure evidently includes production of nine units by Emily during the 3 days, not too much below Respondent's normal daily production, as given by Fogel, of five or six units per day.

[39] I have considered the evidence, conceded by Gold, that 5 or 6 years before he fired the entire work force when the men refused to work ("a partial rebellion") because "they had some gripe or something." I do not believe his steadfast testimony that he did not "recall" what their grievance was, but I cannot say, on this record, that Gold has been shown to have a proclivity to react improperly to lawful concerted activity. Since there is no showing that the earlier activity was protected, Gold's reaction to it may have been legitimate.

[40] As earlier pointed out, there were 130 units in stock on the morning of October 30.

storage, it must again be inferred that, in more normal circumstances, even assuming *arguendo* the initial propriety of the layoff, there would have been an earlier recall than December 26 once there had been a decline in inventory (such as, for example, when it had fallen to 78 units by the end of November 26). In these circumstances, it seems proper to conclude that a full backpay remedy is in order.

H. *The Alleged January 9 Violation*

The complaint alleges that on January 9, 1981, Fogel "threatened an employee with discharge if this employee refused to accept a supervisory position, in order to discourage the employee's union activities."

Shortly after the representation election was held on January 9, Fogel called Eugene Emily into his office and complained that the employees were bothering him about items that Emily should be taking care of. Fogel said that if Emily did not do his job, he would be discharged. Emily said that the question of whether he was supposed to be the foreman was then "in court." Later, after consulting his attorney, Fogel said he would let matters ride. Fogel testified that, since the union campaign, employees had been bothering him about problems which Emily used to handle, and that he wanted Emily to resume his control over these matters.

Having found above that Emily is a statutory supervisor, it follows that the admonition to Emily cannot be considered coercive. I might add that I suspect that, in an effort to shore up his claim of nonsupervisory status, Emily was refusing to perform functions which he had undertaken in the past. He testified that Fogel had been spending more time in the production area "since he asked me if I was going to [run the shop] and I said no." This at least suggests that Emily failed to perform some tasks he might normally have done, thus requiring Fogel to devote himself more to the production area.

III. THE ISSUES IN CASE 14–RC–9292

The Regional Director has ordered consolidation of the complaint case with certain unresolved issues in the representation case. Those issues are (1) the disposition of the ballot cast by Eugene Emily; (2) the disposition of the ballots cast by discriminatees Joseph Emily, Charles Hoffman, Robert Moore, and Michael Rangel; and (3) Respondent's objections to the election, based upon a claim that Emily's participation in the organizational effort "served not only to taint the original showing of interest, but also permeated the entire atmosphere in such a manner as to destroy laboratory conditions and frustrate the full enjoyment of the employees' choice in the election."

Since I have found that Eugene Emily occupied supervisory status at material times, I conclude that his ballot should not be opened and counted. Since I conclude that the four named employees were not on the payroll on the eligibility date only because of Respondent's unlawful discrimination against them, their ballots would normally be opened and counted. *Atlantic Foundry and Pattern Corporation*, 192 NLRB 745, 749 (1971).[41] The propriety of counting those ballots turns, however, on the validity of Respondent's objections to the election grounded on the extent of Emily's role in bringing in the Union.

The evidence shows that in August, Emily and the other employees spoke of getting organized by a union. Emily then made an appointment with a union agent, but when an employee was injured on the appointed day, the meeting was canceled.

In October, according to Emily, "we started talking about trying to get a union in and [Kernebeck] volunteered to call [the union agent] and set up an appointment. "Kernebeck did so, and all the employees went to the Teamsters hall, some in Emily's automobile and the rest in the car of another employee. After speaking with the business agent, and discussing it among themselves, all the employees signed authorization cards. The Union then filed a petition, using those cards as the 30-percent "showing of interest" which the Board requires as a prerequisite to the holding of an election.

Several early cases held that participation by a supervisor in the solicitation of authorization cards impairs a union's showing of interest *pro tanto* and may require dismissal of the petition. *Desilu Productions, Inc.*, 106 NLRB 179 (1953); *The Wolfe Metal Products Corporation*, 119 NLRB 659 (1957); *Southeastern Newspapers, Inc.*, 129 NLRB 311 (1960). Insofar as the Regional Director has referred to me the Respondent's election objection pertaining to the alleged "taint[ing of] the original showing of interest" by virtue of Emily's participation, I find myself in a peculiar position.

In *Georgia Kraft Company*, 120 NLRB 806, 808 (1958), the Board held that "allegations of supervisory participation in, or influence upon, a union's solicitation of a showing of interest" would thereafter be investigated only "administratively" by the Region, rather than litigated in a representation proceeding. It thus seems to have been the Board's intention that an employer was not to be permitted an opportunity to litigate this issue, but rather that the Regional Director was to make his own, presumably unreviewable, determination after an informal investigation. The issue has, nonetheless, been presented here as part of an adjudicatory proceeding, and it would seem pointless to ignore the body of testimony which has thus been developed.[42]

Emily undoubtedly made plain to other employees his preference for union representation. He very clearly did

[41] Indeed, apart from the unfair labor practice finding, it might be said that the four employees were entitled to vote because of their "reasonable expectancy of reemployment" at the time of the direction of the election. *Snap-out Binding & Folding, Inc., Automated Folding & Binding Co.*, 160 NLRB 161, 163 (1980); *D. H. Farms Co.*, 206 NLRB 111 (1973). In so saying, I have considered the rule earlier discussed; even if it can technically be argued to apply to these employees, it would not preclude their having, very clearly, a sufficient "expectancy of reemployment" to warrant their enfranchisement.

[42] In *LeBoe Tire and Rubber Company, d/b/a Mission Tire & Rubber Company*, 208 NLRB 84, 93 (1974), a similar situation, the Administrative Law Judge suggested that his findings on the record made before him could constitute the "administrative" investigation called for by *Georgia Kraft*. The point was evidently not properly before him, as he acknowledged.

this in August when he contacted the union agent; he reiterated his interest in October when Kernebeck revived the effort. Although there is no evidence that Emily brought any direct influence to bear on the other employees when they signed the cards, considering that he may have seemed to them a person of some authority in the plant, his presence could have had an effect on their decision to sign the cards.

Insofar as Respondent's election objection refers to "taint[ing of] the original showing of interest," however, I think it has become a moot question in these circumstances. The requirement of a "showing of interest" is not jurisdictional or statutory; it is merely a self-imposed rule employed by the Board to determine whether there is a demonstration of enough genuine employee interest in a union to justify the expenditure of agency resources for an election. Once an election has been held, as here, that inquiry becomes pointless.

Respondent also argues, however, that Emily's participation "permeated the entire atmosphere in such a manner as to destroy laboratory conditions and frustrate the full enjoyment of the employee's choice in the election." That seems quite unlikely to me. Aside from his presence at the time the cards were signed, there is no evidence that Emily applied any pressure on the other employees with respect to their voting preference. After the cards were signed, and before the election, Respondent unlawfully terminated these employees, an act which, I would think, might have had two material consequences: first, any employee who did not care to be represented by a union before that happened might certainly have had independent reason to think thereafter that union representation would be desirable; second, the termination would have made it clear to them that Respondent did not favor the Union and, in the remote chance that Emily might seek to visit reprisals upon them for refusing to support the Union, that an appeal to Gold or Fogel would find sympathetic listeners.[43] Compare *William B. Patton Towing Company and Tex-Tow Inc.*, 180 NLRB 64, 65 (1969), where the Board refused to set aside an election on the ground of supervisory participation because the employer had made it clear that it was opposed to the union and because of the nature of the perceived relationship ("fellow employees rather than management and rank-and-file") between the supervisors and the employees.

Accordingly, I recommend that the objections to the election be overruled.

CONCLUSIONS OF LAW

1. Respondent, Quick Find Co., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Teamsters Local Union No. 688, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. By laying off Michael Rangel, Joseph Emily, Charles Hoffman, Robert Moore, and Donald Dilschneider on November 6, 1980, Respondent violated Section 8(a)(3) and (1) of the Act.

4. By, in November and December 1980, impliedly promising to rectify employee grievances, coercively interrogating employees, informing an employee that selecting a union would not improve working conditions, impliedly threatening an employee with loss of benefits, impliedly threatening employees with loss of jobs, and granting a benefit to an employee, Respondent violated Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. Except as set out above, Respondent has not violated the Act in any other respect alleged in the complaint.

THE REMEDY

Having found that Respondent unlawfully laid off the five employees previously named on November 6, 1980, I shall recommend an appropriate remedy. It appears from the record that Respondent made a valid offer of reinstatement to all five employees, and the remedy as to them, shall, accordingly, be limited to the payment of backpay. It is recommended that Respondent make the five employees whole for any loss of earnings they may have suffered from November 6, 1980, to December 26, 1980, in accordance with *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[44]

I shall also recommend that Respondent be required to post the customary notices.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended:

ORDER[45]

The Respondent, Quick Find Co., St. Louis, Missouri, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

[43] I consider the possibility of Emily taking revenge to be "remote" simply because, in a secret-ballot election, as the employees would know, he would have no way of ascertaining which employees had voted against the Union unless all of them did; and in the latter case, I cannot imagine Emily attempting any reprisals.

There is, moreover, a clear indication in the record that the employees had no concerns about offending Emily. Both Gold and Fogel testified to an occasion, perhaps about November 13, when Kernebeck came into the office and proposed to abandon the Union if employee Hoffman was recalled to work; Kernebeck represented that Hoffman might also back down in that event. The record shows that Hoffman was recalled on Friday, November 14, and, although Respondent's testimony is that the recall was made because it was believed that Kernebeck would be jailed on November 13, the fact is that Kernebeck returned to work on November 14 and Hoffman was nonetheless retained on the payroll until Wednesday, November 19, when he left to work for his brother.

Kernebeck did not deny the testimony about this proposal to Gold and Fogel, and I believe that it occurred. Among other things, this episode indicates that Kernebeck, at least, exhibited a willingness to independently turn against the Union, regardless of Emily's desires.

[44] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[45] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Discharging, laying off, or otherwise discriminating against employees because of any activities on behalf of the Union, or any other labor organization.

(b) Coercively interrogating employees, and, for the purpose of inducing employees to refuse to support the Union or any other labor organization, promising benefits to employees, granting benefits to employees, informing employees that they would not improve their working conditions by selecting a union, threatening employees with loss of benefits, and threatening employees with loss of jobs.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Make Michael Rangel, Joseph Emily, Charles Hoffman, Robert Moore, and Donald Dilschneider whole in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary, or appropriate, to analyze the amount of backpay due under this Order.

(c) Post at its place of business in St. Louis, Missouri, copies of the attached notice marked "Appendix."[46] Copies of said notice, on forms provided by the Regional Director for Region 14, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon recipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS ALSO ORDERED that those portions of the complaint found to be without merit are hereby dismissed.

IT IS FURTHER ORDERED that the challenge to the ballot of Eugene Emily cast in the election held on January 9, 1981, in Case 14-RC-9292, be sustained, and that the ballot not be opened and counted; that the challenges to the ballots of Joseph Emily, Charles Hoffman, Robert Moore, and Michael Rangel cast in that election be overruled and that the ballots be opened and counted; and that a revised tally of ballots be issued.

IT IS FURTHER ORDERED that the Employer's objections to the aforesaid election are overruled.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice. We intend to abide by the following:

The Act gives employees the following rights:

To engage in self-organization
To form, join, or help unions
To bargain collectively trhough representatives of their own choosing
To act together for collective-bargaining or other mutual aid or protection
To refrain from any or all these things.

WE WILL NOT discharge, lay off, or otherwise discriminate against any employees to discourage membership in Teamsters Local Union No. 688, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

WE WILL NOT coercively interrogate employes about union matters, and WE WILL NOT, in order to affect their support for the Union or any other labor organization, promise benefits to employees, grant benefits to employees, tell employees that selection of a union would not improve their working conditions, threaten employees with loss of benefits, or threaten employees with loss of jobs.

WE WILL NOT in any other manner interfere with, coerce, or restrain employees in the exercise of their rights under the National labor Relations Act.

WE WILL make whole, with interest, Michael Rangel, Joseph Emily, Charles Hoffman, Robert Moore, and Donald Dilschneider for the loss suffered by them because of their layoff from November 6 to December 26, 1980.

QUICK FIND CO.

[46] In the event that this Order is enforced by a Judgment of United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."